BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SHARON ANN HILL	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 234,285 & 236,528
INTERIM PERSONNEL and	)	
VITA CRAFT CORPORATION	)	
Respondents	)	
AND	)	
	)	
INSURANCE CO. STATE OF PENNSYLVANIA and	)	
CONTINENTAL NATIONAL AMERICAN GROUP	)	
Insurance Carriers	)	

ORDER

Respondent Vita Craft Corporation and its insurance carrier Continental National American Group appeal from an Order dated December 9, 1998 entered by Administrative Law Judge Steven J. Howard.

ISSUES

This appeal involves two docketed claims which were consolidated for preliminary hearing. Docket No. 234,285 involves an accident that occurred on September 7, 1996 while claimant was employed with Interim Personnel. Docket No. 236,528 involves an alleged accident on March 30, 1998 while claimant was employed by Vita Craft Corporation. An injury to claimant's right shoulder and arm is alleged in both docketed claims.

At the preliminary hearing Interim Personnel admitted claimant suffered an accidental injury arising out of and in the course of her employment on September 7, 1996, but denied that claimant timely served written claim. Interim Personnel also argued that claimant suffered a subsequent injury during her employment with Vita Craft and that claimant's current need for medical treatment was the result of that subsequent injury.

Vita Craft denied accidental injury arising out of employment arguing instead that the medical treatment being sought by claimant was the result of the previous injury

suffered while employed at Interim Personnel. Vita Craft also denied timely notice of accident.

On appeal, Vita Craft "asserts that Judge Howard exceeded his jurisdiction in (apparently) suggesting hospitalization and temporary total compensation, without specifying any findings required under K.S.A. 44-534a(2), or even detailing which of the employer/carrier [sic] should be responsible for such benefits."

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Appeals Board will first address the question of whether the ALJ exceeded his jurisdiction by entering an Order for preliminary hearing benefits without making specific findings and conclusions concerning the defenses raised by the two respondents and insurance carriers and without specifying which respondent and insurance carrier is responsible for the benefits that were ordered to be provided claimant.

The entire text of the ALJ's findings and orders is as follows:

> "Authorized physician is Dr. Robert P. Bruce or Dr. Lanny W. Harris.
>
> "Temporary Total Compensation to commence upon hospitalization and continue until released to any substantial or gainful employment.
>
> "The above findings are hereby made the orders, decrees, and rulings of the Court.
>
> "Costs herein are hereby taxed to the Respondent Vita Craft Corporation and CNA.
>
> "Parties to split equally the costs of today's transcript."

Since the ALJ awarded benefits, it follows that he found the claim to be compensable. Specific findings concerning the defenses raised, while helpful, are not required.

Whether the ALJ found one accidental injury or two, and which respondent/insurance carrier is to be responsible for the payment of the ordered preliminary hearing benefits, turns upon the interpretation that is to be given to the last two paragraphs of the ALJ's Order quoted above. Either these paragraphs contain a contradiction concerning the assessment of costs, or the first order taxing costs "to the respondent Vita Craft Corporation and CNA" means that the ordered benefits are to be paid by Vita Craft and Continental in Docket No. 236,528 but the costs of the hearing transcript are to be split equally between the two docketed claims and assessed one half each against the respective respondent and insurance carrier. Although the Order could

have been worded more clearly, the Appeals Board finds that these paragraphs are not contradictory and that the ALJ intended by his Order to find a second compensable accidental injury occurred on March 30, 1998 in Docket No. 236,528.

We now turn to the question of whether claimant sustained a second injury to her right shoulder by accident on March 30, 1998 or, instead, her condition is a natural consequence of her prior injury which is the subject of Docket No. 234,285.

Interim Personnel is a temporary employment service. On September 7, 1996, while working for Interim Personnel at Vita Craft, claimant injured her right arm and shoulder pulling a heavy crate. She reported her injury to her supervisors at Vita Craft and medical treatment was provided. She was eventually seen by Dr. Robert P. Bruce who administered a cortisone injection and also recommended an arthroscopy. She returned to work in approximately April of 1997 and worked continuously until March of 1998. At some point during this time period she became an employee of Vita Craft. On March 30, 1998 she was operating a buffer when she experienced "a real bad burning sensation in the back of my shoulder here and then in my biceps." Claimant described this pain as stronger than what she had experienced previously. Claimant testified that she informed her "boss" Mike Millard of this incident on the day it happened. This testimony is uncontroverted. Accordingly, the Appeals Board finds that timely notice of the alleged March 30, 1998 accident was given to respondent Vita Craft.

Claimant returned to Dr. Kracht at the Business and Industry Health Clinic. She was given six weeks of physical therapy but received little relief. Dr. Kracht referred her back to Dr. Bruce. Vita Craft then sent her to Dr. Lanny W. Harris who also recommended surgery. Claimant was asked whether the symptoms she had after the March 30, 1998 incident differed from the symptoms she had previously. Claimant answered that her symptoms got worse insofar as the pain she experienced when using her arm and also with having more of a constant pain than before. She was able to continue performing her job by not raising her arm and by compensating for her injured right arm by using her left arm more.

After the first injury, Dr. Bruce released claimant to full duty on March 24, 1997. Sometime in February of 1997 Dr. Bruce had suggested to claimant that she needed arthroscopic surgery to her right shoulder. But claimant elected to first try the cortisone shots and thereafter she elected not to proceed with surgery. Claimant testified that when she returned to the Business and Industry Health Group in the Spring of 1998 she described the specific event that caused the reoccurrence of pain in her shoulder. After reviewing the records of those visits, however, claimant agreed that there was no mention of a new injury contained in those records. When claimant returned to Dr. Bruce on April 7, 1998, however, those records do show claimant gave a history of her symptoms getting worse from using a buffer but claimant could not recall any specific accident. Dr. Bruce again recommended arthroscopic surgery or cortisone treatments. Dr. Harris was more definite in recommending surgery. Dr. Harris' recommendation was based upon

his clinical examination, history and the MRI done February 17, 1997. It is not clear from his report whether the MRI findings alone, without the recent onset of worsened symptoms, would have resulted in Dr. Harris recommending surgery. His report relates an injury date of September 7, 1996, but also has the history that "starting about March or so if [sic] this year, she started doing buffing at work, and had an exacerbation of pain and discomfort." Nevertheless, the June 4, 1998 report by Dr. Harris concludes with the following paragraph which seems to relate claimant's present need for surgery to the original September 1996 accident:

> "She has failed to respond over approximately 1 1/2 to 2 year period of time, and I do believe that she will not resolve this without interventional treatment."

Dr. Bruce issued a follow-up report dated August 13, 1998, which likewise relates the present recommendation for surgical treatment to the 1997 injury:

> "I feel her symptoms and signs of impingement syndrome are consistent in 1998 with her findings in 1997 and I think are referable to the same injury. The surgery that we discussed April 28, 1998 I feel is for treatment of the same injury sustained in January [sic] 1997."

Generally, workers compensation laws require an employer to compensate an employee for personal injury or aggravation of a preexisting injury incurred through accident arising out of and in the course of employment. K.S.A. 1998 Supp. 44-501(a); Kindel v. Ferco Rental, Inc., 258 Kan. 272, Syl. ¶ 2, 899 P.2d 1058 (1995); Baxter v. L.T. Walls Constr. Co., 241 Kan. 588, 738 P.2d 445 (1987). The question of whether there has been an accidental injury arising out of and in the course of employment is a question of fact. Harris v. Bethany Medical Center, 21 Kan. App. 2d 804, 909 P.2d 657 (1995).

In Jackson v. Stevens Well Service, 208 Kan. 637, 643, 493 P.2d 264 (1972), the court held:

> [W]hen a primary injury under the Workmen's Compensation Act is shown to have arisen out of and in the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.

Claimant is seeking medical treatment for an aggravation that occurred after the admitted September 7, 1996 work-related accident. The question of whether the aggravation of claimant's condition is compensable under workers compensation as a new injury turns on whether claimant's work-related activity aggravated, accelerated, or intensified the disease or affliction. Boutwell v. Domino's Pizza, 25 Kan. App. 2d 110, 121, 959 P.2d 469 (1998), *rev. denied* 265 Kan. ___ (1998). If based upon the claimant's testimony alone, the Appeals Board could find that it did. But the expert medical opinions

are to the contrary. Those opinions place responsibility for claimant's condition upon the first accident, which occurred on September 7, 1996.

It is significant to this fact finder that although claimant relates a worsening of her symptoms to the buffing incident in March 1998, she does not describe being pain free for any significant period since her release to return to work despite the fact she received a release to full duty. Both Dr. Bruce and Dr. Harris relate the claimant's present need for surgery to the previous accident. Neither Dr. Bruce nor Dr. Harris state that the March 1998 incident intensified claimant's infliction or accelerated her need for surgery. Based upon the present record the Appeals Board finds there has been one accident, which is the subject of Docket No. 234,285.

Finally, we come to the written claim defense. At page 3 of the transcript of the December 8, 1998 preliminary hearing proceedings there appears the following statement by Judge Howard:

> The record should reflect that claimant is making two claims of accident, the first being September 7th, 1996 at which time she was employed by interim Personnel who is insured by Credit General.[1] On that alleged accidental injury date respondent admits accidental injury arising out of and in the course of employment, notice, but specifically denies timely written claim. Claimant indicates that claim was filed on August 19th, 1998. The parties have stipulated for purposes of today's hearing, and today's hearing only, that claimant last received medical under the direction of this respondent and insurance carrier on March 21, 1997 and following that date payment was made on April 18th, 1997.

Based upon the above stipulation, the Appeals Board finds that a written claim for compensation was not served upon the employer within 200 days after the date of the last payment of compensation. Accordingly, K.S.A. 44-520a(a) bars the claim in Docket No. 234,285. Whether or not the employer filed a report of accident with the Director is irrelevant since the claim was more than one year from the date of the last medical treatment authorized by the employer. *See* K.S.A. 44-557.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order entered by Administrative Law Judge Steven J. Howard on December 9, 1998, should be, and the same is hereby, reversed and preliminary hearing benefits are denied.

IT IS SO ORDERED.

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[1] Although counsel for Interim Personnel asserts that its insurance carrier is Credit General, the Division's records show the respondent's insurance carrier as Insurance Company of State of Pennsylvania.

Dated this ____ day of March 1999.

BOARD MEMBER

c: David B. Mandelbaum, Kansas City, MO
Tammy N. Etem, Kansas City, MO
Thomas D. Billam, Overland Park, KS
Steven J. Howard, Administrative Law Judge
Philip S. Harness, Director